



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELCA 25 OF 2018**

**EUNICE WAMBUI NDEGWA.....APPELLANT**

**VS**

**MONICAH WANARI KAMAU.....RESPONDENT**

**(Being an Appeal from the judgement delivered by Hon A MWANGI SRM in MCELC 12 of 2018- Kigumo).**

**JUDGMENT**

1. The Appellant herein being aggrieved with judgment and decree of A. Mwangi Senior Resident Magistrate on 09.11.2018 in the Senior Resident Magistrate's Court at Kigumo ELC No. 12 of 2018 proffered the present appeal vide a memorandum of appeal dated 07.12.2018 on the following grounds;

- a. The learned trial Magistrate erred in fact and in law by holding that the Appellant had participated in the alleged fraud.
- b. The Learned trial Magistrate erred in fact and in law by failing to appreciate the law on fraud and more so that the claim was barred under the Limitations of Actions Act.
- c. The Learned trial Magistrate erred in fact and in law by failing to appreciate the evidence and submissions of the Appellant.
- d. The Learned trial Magistrate misdirected himself on the law and facts when he made a finding that there were fraud entries without any evidence in support of the same.

2. Subsequently the Appellant made the following prayers;

- a. The Appeal be allowed.
- b. The entire judgment of the Honourable Senior Magistrate dated 9<sup>th</sup> November 2018 be discharged and set aside.
- c. Such further orders as this honorable Court may deem fit.

3. The impugned judgment was in respect to the claim instituted through a plaint dated 06.11.2015 in which the Plaintiff claimed a beneficial right over a portion of one acre of land out of the parcel of land known as LOC.2/GACHARAGE/363 (hereafter referred to as the suit land). It was the Plaintiff's claim that her late brother namely Samuel Kimani Mwangi was a beneficiary to the estate of the late Boronje Kariuki by virtue of a certificate of confirmation of Grant issued on 25.07.2003 in Murang'a S.P.M's Succession cause No. 298 of 1995. That the original parcel of land was duly subdivided and the resultant parcel number LOC.2/GACHARAGE/2953 ought to have been registered in the name of the Plaintiff's late husband. She however claims that the 1<sup>st</sup> Defendant as the Administratrix to the estate connived with the officers at the lands office and had the suit land registered in her name instead. That the 1<sup>st</sup> Defendant thereafter transferred the suit land to the 2<sup>nd</sup> Defendant. The Plaintiff contended that the 1<sup>st</sup> Defendant lacked good title to pass to the 2<sup>nd</sup> Defendant and the same ought to be nullified.

4. The Plaintiff sought the following reliefs;

- a. A declaration that the registration of the 1<sup>st</sup> Defendant as the proprietor of LOC.2/GACHARAGE/2953 was fraudulently acquired and the subsequent transfer and registration of the 2<sup>nd</sup> Defendant as the proprietor is null and void and her registration as the owner and her title are cancelled.
- b. The land Registrar Murang'a be authorized to delete entry No. 1,2, and 3 in the abstract of title in respect of

LOC.2/GACHARAGE/2953 and in their place and stead the names of Plaintiff be inserted as the registered proprietor of LOC.2/GACHARAGE/2953 and a new title be issued in her names.

c. Costs of this suit.

5. The suit before the trial Court was defended through a statement of defence by the 2<sup>nd</sup> Defendant dated 03.12.2015 in which she denied the averments made in the plaint and contended that she purchased the suit land from the Plaintiff's brother during his lifetime and had it transferred to the 1<sup>st</sup> Defendant during his lifetime. She categorically denies to have purchased the suit land from the 1<sup>st</sup> Defendant as contended by the Plaintiff.

6. Upon hearing both parties, reviewing the submissions and exhibits produced by the parties the honourable trial Court found that the letter of consent relied upon by the 2<sup>nd</sup> Defendant was allegedly obtained before the subdivision of the mother title had been done and before creation of the resultant suit land with the former being obtained on 11.04.2006 whilst the later was done on 6.12.2006. When the register for the suit land was opened. Essentially the suit land did not exist at the time when the 2<sup>nd</sup> Defendant claims to have gone with the Plaintiff's husband to the land board to obtain the consent. The Court also found that the search certificate produced by the 2<sup>nd</sup> Defendant to have sharply contradicted the particulars on the copy of the title with the former showing an entry no. 2 in favour of the Plaintiff's brother while the copy of title showed an entry no. 2 in favour of the 2<sup>nd</sup> Defendant. That the green card did not reflect any entry of ownership in favour of the Plaintiff's late brother. That the alleged purchase by the 2<sup>nd</sup> Defendant was unsupported with documentary evidence in form of a sale agreement and transfer of land. The trial Court also found that if the 1<sup>st</sup> Defendant was the 1<sup>st</sup> registered owner of the suit land then the transfer was curiously done to the 2<sup>nd</sup> Defendant as a gift in the guise of a sale.

7. In the premises, the trial Court concluded that the 2<sup>nd</sup> Defendant was an untruthful witness for relying on false documents in support of her case and proceeded to allow the Plaintiff's claim by issuing a declaration that the 1<sup>st</sup> Defendant had acquired the registration over the suit land through fraudulent means and nullified the transfer to the 2<sup>nd</sup> Defendant. She also authorized the cancellation of the fraudulent entries in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and ordered for reversion of the suit land to the estate of the deceased for redistribution through succession. It is this judgment that aggrieved the Appellant leading to the filing of the appeal.

8. The appeal was disposed of through written submissions.

9. The Appellant submitted that the trial Court inferred fraud from the facts and yet there was no proof of the fraud as required in law. That the Plaintiff had not specifically pleaded and particularized the specifics of fraud against the Defendants in the manner prescribed in law and relied on the case of **Kinyanjui Kamau vs. George Kamau Njoroge [2015]Jeklr Civil appeal no. 132 of 2005** where the Court of appeal held that;

“to succeed in the claim for fraud, the Appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the Court would make a finding. In the present appeal, there is no such evidence, and the Courts below rightly came to the conclusion that the Appellant had not made out a case for the grant of the orders he sought.”

10. The Appellant also contended that the 1<sup>st</sup> respondent's claim before the trial Court was statute barred by virtue of her confession that she discovered the fraudulent transactions on the land in the year 2010 but filed the suit in 2015. The Appellant opined that the 1<sup>st</sup> respondent sat on her rights if any for a period of five years and the rights were thus extinguished by effluxion of time by dint of section 4(2) as read with section 26 of the Limitation of Actions Act.

11. The 1<sup>st</sup> respondent submitted that the issue of whether the Appellant had committed acts of fraud was extensively addressed by the trial Court and quoted various parts of the trial Court's judgment that evaluated the evidence placed before it by the defence which was riddled with inconsistencies that led to the conclusion of the fraudulent acquisition of the title by the 1<sup>st</sup> respondent and subsequent transfer to the Appellant. The 1<sup>st</sup> respondent also contends that the Appellant is estopped from raising the defence of limitation of actions at the appeal stage whilst the same was not specifically pleaded in her defence by dint of order 7 rule 4(1) of the Civil Procedure Rules. She further argues that the claim was founded on recovery of land thus the applicable section under the Limitation of Actions Act would be section 7 of the said Act and submits that her claim was well within time.

12. My mandate as the first appellate Court as set out in many decided cases was aptly captured by the then East African Court of Appeal in **Selle v Associated Motor Limited Company [1968] EA 123**, as follows;

“...This Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. The Appellant has impugned the decision of the trial Court for failing to find that the suit was statute barred. The Plaintiff's claim is for recovery of land. In the circumstances the applicable Law is Section 7 of Limitation of Actions Act provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

14. Section 26 of Limitations of Action Act provides as follows;

“Extension of limitation period in case of fraud or mistake Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did.”

15. The Respondent in the lower Court averred that she discovered that the title had been registered in the name of the Appellant in the year 2010 and filed the suit in 2015. Going by the provisions of section 7 above read together with section 26, the Court finds that the suit is not time barred.

16. I find that the Learned Magistrate interpreted the law correctly in determining the issue of statutory bar and I find no ground to fault her.

17. The Appellants impugned the learned Magistrates decision in finding that there was fraud. It is the case of the Appellant that fraud was not proved to the standard required which is higher than the balance of probabilities and lower than that of beyond reasonable doubt in criminal cases. The Appellant faulted the trial Court for finding for fraud when its particulars were not pleaded. The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities. (See **Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR**; **Bruce Joseph Bockle v Coquero Ltd (2014) eKLR**).

18. It is trite that particulars of fraud be specifically pleaded and strictly proved. Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person’s right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved in **Emfil Ltd v Registrar of Titles Mombasa (supra)**, the Court of Appeal held as follows on the issue:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. ....”

19. I have looked at the plaint where the Plaintiff brought three accusations against the Defendant as follows;

“6. In a move calculated at disinheriting the Plaintiff’s husband of his rightful share of the 1<sup>st</sup> Defendant connived with unscrupulous people in the lands office and registered herself as the proprietor of the suit land.

7. the 1<sup>st</sup> Defendant further perpetrated the mischief and connived with the 2<sup>nd</sup> Defendant and transferred the suit land to her.

8. the Plaintiff avers that since the 1<sup>st</sup> Defendant’s registration and the title thereof are fraudulently acquired; she could not pass on a valid title to the 2<sup>nd</sup> Defendant and her registration as the proprietor of the suit land is null and void.

20. Arising from the above paras it is the holding of the Court that though the Plaintiff failed to plead particulars of fraud in the plaint fraud was pleaded in a clear manner to put the Appellant on notice as to warrant the adduction of cogent explanation on how she acquired the suit land.

21. It is not in dispute that the suit land is now registered in the name of the 1<sup>st</sup> Defendant. Section 24 of Land Registration Act states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto. Additionally section 25 of Land Registration Act states that the rights of a proprietor whether acquired through first registration, or subsequently for valuable consideration or by order of the Court shall not be liable to be defeated except as provided for by the Act and shall be held subject to the overriding interests encumbrances, leases interalia.

22. Section 26 of Limitations of Actions Act provides 2 ways in which a title may be impeached. It states as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

23. Part a) of the above law provides that title may be impugned on the ground of fraud or misrepresentation to which the person is proved to be a party. The process of proof is through a legal process. Proof is by adducing evidence which evidence must be cogent to found a finding of fraud.

24. It is the finding of this Court that though the Plaintiff failed to plead and prove fraud in specific, she led evidence was adduced to show that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dealt with the title in a manner inconsistent with the evidence of the Appellant and the law.

25. I shall now turn to the second instance in which a title may be impugned. This is in circumstances where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

26. The Plaintiff pleaded that the 1<sup>st</sup> Defendant connived with some people in the land's office to effect registration of the title in her name.

27. Black's Law Dictionary at page 366 gives the meaning of conniving as to knowingly overlook another's wrongdoing. Loosely refers to conspiracy.

28. It is on record that the 1<sup>st</sup> Defendant was the administrator of the estate of Boronje Kariuki in which Samuel Kimani Mwangi was allocated one acre of the original land LOC2/GACHARAGE/363 as per the confirmation of grant issued in SPMCC No 298 of 1995 issued on the 30/7/2003. The Appellant (2<sup>nd</sup> Defendant in the lower Court) led evidence that she bought the land from the late Samuel Kimani Mwangi. That she and Samuel attended the Lands Control Board and obtained LCB on the 11/11/06. There is no evidence on record to show when the main land was subdivided to yield the suit land but it is clear that by 11/11/06, parcel 2953 had not come into existence by way of registration. However, the certified copy of the green card shows that the land was registered in the name of the 1<sup>st</sup> Defendant on the 6/12/2006 and transferred to the 2<sup>nd</sup> Defendant on the 30/1/07 by way of a gift. This contradicts the 2<sup>nd</sup> Defendant's defence that she bought the land for the sum of Kshs 105,000/-. It is clear from the record that the 2<sup>nd</sup> Defendant did not support the averment of purchase through any documents such documents being sale agreement and a transfer between Samuel and herself.

29. It is not lost on the Court that the said Samuel never became registered as proprietor of the suit land. The 2<sup>nd</sup> Defendant led evidence and produced a copy of an official search dated the 6/12/06 which purports that Samuel was registered as owner under entry No 2 on the 6/12/06. A thorough perusal of the green card indicates that the suit land was registered in the name of the 1<sup>st</sup> Defendant on the 6/12/06 as entry No 1. Entry No. 2 is the name of the 2<sup>nd</sup> Defendant dated 30/1/07. The certified copy of the green card was not been challenged by the 2<sup>nd</sup> Defendant/Appellant and is taken by this Court to be authentic register and record of the suit land.

30. The question that remains unanswered therefore is how the land became registered in the name of the 2<sup>nd</sup> Defendant. Why was the administrator of the estate gifting land to the 2<sup>nd</sup> Defendant legally belonging to Samuel before discharging her duties of distributing the estate for which she was an administrator in law.

31. The Court cannot fold its hands in the face of apparent illegalities as analyzed aptly by the trial Court.

32. The Appellant has impugned the trial Court for failing to appreciate the evidence and submissions of the Appellant. To the contrary I find no fault in the manner in which the trial Court analyzed the evidence before it.

33. In the case of **Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another [2013] EKLK**, the Court observed as follows;

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st Defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st Defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st Defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He is a victim of the scheme employed by the 2nd Defendant. I cannot therefore impeach his title by virtue of the provisions of Section 26 (1) (a).

Is the title impeachable by virtue of Section 26(1) (b) " First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”

34. Going by the provisions of section 26 (1) (b) of the Land Registration Act, I find that this is a case where the Court can impeach title. The Court entirely concurs with the finding of the lower Court in its findings.

35. The appeal is therefore dismissed. The decision of the lower Court is substituted as follows;

a. A declaration that the registration of the 1<sup>st</sup> Defendant as the proprietor of LOC.2/GACHARAGE/2953 was illegally procedurally acquired and the subsequent transfer and registration of the 2<sup>nd</sup> Defendant as the proprietor is null and void the registration of title in the Appellant be and is hereby cancelled.

b. The land Registrar Murang'a be authorized to delete entry No. 1,2, and 3 in the abstract of title in respect of

LOC.2/GACHARAGE/2953 and in their place and stead the names of Samuel Kimani Mwangi be inserted as the registered proprietor of LOC.2/GACHARAGE/2953 and a new title be issued.

c. The costs of the appeal and that of the lower Court shall be met by the Appellant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 31<sup>ST</sup> OCTOBER 2019**

**J. G. KEMEI**

**JUDGE**

**In the presence of:**

Wachira HB for Ms Kimani for the Plaintiff

Defendant – Absent, Advocate –

absent

Ms.Njeri and Mr Kuyiki, Court Assistants.